

**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE**  
**IN AND FOR SUSSEX COUNTY**

THE STATE OF DELAWARE,	)	
	)	<b>C.A. No. 2003-11-023</b>
	)	
vs.	)	
RICHARD ASHBY	)	
	)	

Decided February 7, 2005

Donald Bucklin, Esquire, Deputy Attorney General  
Andre M. Beauregard, Esquire, counsel for Defendant.

**DECISION ON MOTION FOR  
RECONSIDERATION OF COMMISSIONER'S RECOMMENDATION THAT  
RESPONDENT BE DECLARED A HABITUAL OFFENDER**

The Respondent, Richard A. Ashby, has filed a Motion for Reconsideration of the Commissioner's Recommendation that the Respondent's License be Revoked, pursuant to Civil Rule 112. The Court finds and determines as follows.

**BACKGROUND**

The Respondent accumulated a number of convictions for motor vehicle offenses that occurred during a five-year period. On November 20, 2001, in accordance with 21 *Del. C.* § 2802, the State filed a petition to declare the Respondent a habitual offender. After a hearing on October 6, 2003, the Commissioner recommended that the Petition against the Respondent be dismissed because the Petition contained inaccurate information, namely

incorrect dates for the supporting offenses. This Court entered an Order of Dismissal on October 29, 2003.

On November 7, 2003, the State filed a new Petition and again sought to have the Respondent declared a habitual offender. The matter before this Court is the new Petition. The new Petition set forth the same offenses with corrected dates and was accompanied by the Respondent's driving record and a disposition report. Specifically, the Petition enumerated the following offenses: (1) No valid license plea on October 24, 1996 and a finding of guilt by the Court on January 24, 1997; (2) Driving while under the influence of alcohol or drugs on February 8, 1999; and (3) Driving while under the influence of alcohol or drugs on September 18, 2001.

Upon a hearing on the new Petition, the Commissioner found that the State established that the Respondent accumulated three convictions within a five-year period, as required by 21 *Del. C.* § 2802. Thus, the Commissioner recommended that the Respondent be declared a habitual offender and his license be revoked for a period of five years, commencing July 22, 2002. The Respondent now moves to have the Commissioner's recommendation reconsidered under Civil Rule 112.

#### **STANDARD OF REVIEW**

The standard of review of a decision by this Court's Commissioner is dependent upon the issue decided by the Commissioner. Non case-dispositive matters are afforded a more differential review. Rule 112 dictates that the Court should accept the Commissioner's decision on non case-dispositive matters unless the findings or conclusions are clearly erroneous, contrary to law or an abuse of

discretion. CCP Civ. R. 112(A)(3)(iv). Rule 112 also provides the applicable standard of review on case-dispositive matters. When reviewing case-dispositive matters the judge of the Court reviews the decision *de novo*. CCP Civ. R. 112(A)(4)(iv).

A recommendation concerning the suspension or revocation of a person's drivers license is a case-dispositive matter. *State v. Williams*, 2001 WL 1556980, \*1 (Del. Com. Pl. 2001). Thus, the Commissioner's proposed findings in this matter are case-dispositive. Therefore, under Civil Rule 112, the Court shall make a *de novo* determination as to those findings of fact and recommendations that are being opposed.

#### **REVIEW OF RECOMMENDATION TO REVOKE THE RESPONDENT'S LICENSE**

The Respondent directs this Court's attention to three matters of review. First, the Respondent argues that the State failed to follow appropriate procedure by filing a new Petition once the initial Petition was dismissed. Second, the Respondent argues that the lapse in time between the date of the last conviction and the new Petition constitutes a violation of due process. Finally, the Respondent argues that the Commissioner based his recommendation on the initial Petition, rather than on the Petition at hand, dated November 7, 2003.

##### *Procedural Appropriateness of New Petition*

The Respondent argues that the State followed incorrect procedure after the initial petition was dismissed when it filed a new Petition on November 7, 2003. Alternatively, the Respondent contends that the State should have filed a Motion to Re-argue or sought some other appellate remedy. However, the Court notes that the initial Petition was correctly dismissed because it had inaccurate

information. Because the initial Petition was dismissed it was necessary for the State to file a new Petition.

The State did not violate the double jeopardy clause when it filed the new Petition. The proceeding at issue is civil in nature. When the penalty sought to be imposed is a civil penalty, no question of double jeopardy arises. *Kamalski v. State*, 429 A.2d 1315, 1318 (Del. Super. 1981). Thus, the State's new Petition did not violate the Constitutional proscription against double jeopardy.

#### *Lapse of Time as a Violation of Due Process*

The Respondent also claims that the lapse in time between the most recent conviction and the date that the new Petition was filed violates his due process rights. The offense that the Respondent was most recently convicted of committing occurred on September 18, 2001. The new Petition was filed on November 7, 2003. Thus a period of approximately two years, one month and 8 days elapsed between the most recent conviction and the filing of the new Petition.

In support of his argument, the Respondent relies heavily on *State v. Kamalski*. 429 A. 2d 1315. In *Kamalski*, the court addressed the concern that a delay in bringing an action to revoke a person's license may result in a violation of due process of law. *Id.* at 1319. The court explained that such a delay violates the due process clause, if the Respondent shows "that this delay resulted in actual prejudice to the defendant, or was an intentional device by the State to gain a tactical advantage over the accused, or was brought solely to harass the accused." *Id.* The court opined that the respondent's due process rights were not violated because the respondent failed to show that the State's delay in bringing a

habitual offender proceeding against him was unduly prejudiced, harassed him or was delayed to gain some advantage by the State.

The Respondent asserts that the *Kamalski* court noted that a two and one half year delay in bringing suspension proceedings is a violation of due process. However, under Delaware law, a lapse of two and one half years does not automatically indicate that a respondent has been denied due process.<sup>1</sup> Rather the *Kamalski* decision requires the respondent to show that he suffered actual prejudice or harassment by the delay, or that the State intentionally delayed the proceeding to gain a tactical advantage. Thus, in order to succeed on a due process claim, the Respondent must establish one or more of the *Kamalski* factors.

There is nothing to evidence a finding that the State intentionally delayed the § 2802 proceeding to gain an advantage over the Respondent. The Respondent focuses his due process argument on the time period between the date of the last conviction and the filing date of the new Petition. This time period would include that time which elapsed between the filing of the initial Petition and the dismissal of the initial Petition. The initial Petition was filed on November 20, 2001. The initial Petition was dismissed on October 29, 2003. Although the Respondent now challenges this delay, the record indicates that the postponement between the initial Petition and dismissal was, at least in part, the result of the Respondent's requests to continue the hearing. The State filed the

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<sup>1</sup> When the *Kamalski* court noted that a two and one half year period could be construed to violate the due process clause, it was referring to a case decided by the Supreme Court of New Jersey, *In re Arndt*. 341 A.2d 596 (N.J. 1975). While the *Arndt* case would not be binding on this Court, it may be persuasive. In *Arndt*, the court found that the agency's 20-month delay from the time the agency was notified of the offense to the time it notified the respondent of the proceeding was an "unconscionable, harassing delay." *Id.* at 598. Thus, the court reasoned that the 20-month delay was a violation of due process. *Id.* Unlike in the *Arndt* case, the Respondent was originally given notice of the proceeding against him when the State filed the initial Petition. Only eight days elapsed before he was notified of the new Petition to have him declared a habitual offender. Thus, the delay in the case at hand was brief and reasonable, rather than lengthy and unexplained as it was in *Arndt*.

new Petition a reasonable eight days after the Court dismissed the initial Petition. Therefore, this Court finds that the State did not attempt to gain nor did it actually gain a tactical advantage over the Respondent in the time period that elapsed from the date of the last conviction to the date of the new Petition.

Additionally, the Respondent does not contend that the State filed the new Petition solely to harass him. Nothing in the record suggests such misconduct on the part of the State. The Court finds that the State did not file the new Petition merely to harass the Respondent.

Respondent also has not shown actual prejudice amounting to a violation of due process. Again, the Court notes that the Respondent's own requests for continuation of the hearing on the initial Petition substantially contributed to the overall delay. Respondent cannot claim prejudice by a delay he himself has greatly caused. Respondent argues that he has used this time period to get his life back in order. Although Respondent's action is commendable, it does not follow that he was actually prejudiced by the delay in filing the new petition. Respondent's right to due process was not violated by the State's filing of a new habitual offender Petition eight days after the Court's dismissal of the prior petition.

#### *Petition at Issue*

In his Motion for Reconsideration, the Respondent argues that the Commissioner committed error because his recommendation was based on the initial Petition and not the new Petition, dated November 7, 2003. In his Motion, the Respondent also alleges that the new Petition listed the dates of the offenses incorrectly.

The new Petition lists three offenses, all of which are contained in the Respondent's attached driving record. The transcript of the hearing indicates that the Commissioner based his findings upon the fact that the Respondent was convicted of three offenses within the statutory five-year period. The dates referenced indeed indicate that the Respondent committed three requisite offenses within the statutory five-year period. Therefore, the Court finds that the Commissioner reviewed, and made his recommendation upon the appropriate, present Petition.

Respondent argues that the new Petition lists incorrect dates. The dates stated in the Petition indicate when the Respondent was convicted. Section 2802 defines a habitual offender as a person who has "accumulated convictions" for offenses listed in subsection (1). Subsection (4) defines a "conviction" as a "final conviction, a plea of guilty or a forfeiture of bail. . . ." The Petition correctly states the conviction dates of three requisite offenses within a five year period, and conforms to the conviction information in the certified driving record attached to the Petition, with one exception. The Petition states the first included offense conviction date of January 24, 1997, when in fact the Respondent's certified driving record states the conviction date as January 23, 1997. This is an obvious typographical error and causes no substantive or procedural defect.

### **CONCLUSION**

After a *de novo* review of the law and facts, I find that the Commissioner's recommendation to revoke the Respondent's Driver's License was proper. First, the State followed the appropriate procedure when it filed the new Petition, dated

November 7, 2003. Second, the Respondent is not denied due process because of the lapse in time between the date of the last offense and the filing of the new Petition. Finally, the Commissioner correctly based his recommendation on the new Petition, which indicates that the requirements of § 2802 were satisfied. Therefore, the Respondent's Motion is **DENIED**, and the Commissioner's recommendation is **ACCEPTED**.

**IT IS SO ORDERED**, this \_\_\_\_ day of February, 2005.

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Kenneth S. Clark, Jr.  
Judge